IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-816

PETER LUCA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, by his attorney, Neil H. Fink, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

OPINIONS BELOW

Petitioner was found guilty by a jury in the United States District Court for the Eastern District of Michigan on October 15, 1975, of violation of the Extortionate Extension of Credit Act, 18 USC §894 (Counts I-IV). Petitioner filed timely notice of appeal and on October 29, 1975, the Sixth Circuit Court of Appeals affirmed the convictions via a *per curiam* opinion set forth *infra,* in Petitioner's Appendix.

JURISDICTION

The opinion and judgment of the Sixth Circuit Court of Appeals was entered on October 29, 1975. The jurisdiction of this Court is involved pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

I.

Was Petitioner denied a fair trial by the conduct of the Trial Judge in rejecting in the course of Petitioner's cross examination, factual assertions which were directly contrary to Petitioner's theory of the case, in belittling Petitioner's counsel, and in giving *Sua Sponte* a jury instruction which was gratuitously critical of an aspect of Petitioner's theory of defense?

II.

Whether Petitioner's conviction must be reversed because the facts adduced at trial when taken in a light most favorable to the government, and when viewed as wholly

supporting the government's theory of the case do not show an "Extension of Credit" within the meaning of 18 USC §891 to have taken place.

III.

Was Petitioner deprived of a fair trial by the improper argument of the government attorney?

STATEMENT OF THE CASE

Petitioner Peter Luca and one Tommy Misco were charged in a six count indictment with violations of the Extortionate Extension of Credit Act, 18 USC §894 (Counts I-IV), and conspiracy to violate, and a substantive violation of the Travel Act, 18 USC §1952, alleging the use of a facility of foreign commerce (a telephone line between Detroit, and Windsor, Ontario, Canada) to carry on, facilitate or promote the illegal activity of extortion. (Counts V and VI).

The case came on for trial before the Honorable Thomas P. Thornton, Judge of the United States District Court, Eastern District of Michigan and a jury. Counts V and VI (Conspiracy to violate and violation of 18 USC §1952) were dismissed by the Court upon Motion of the defense.

The Government's proofs at trial revolved around the testimony of one Milton Dean West, whom the Government presented as the victim of the alleged scheme of extortion.

West, a Ford Motor Company executive (T.T. 23*) testified that he had known Petitioner Luca for some two years

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* Throughout, reference to the transcript of trial will be designated by the letters "T.T." and page number of the Reporter's transcript.

before the events which are the subject of the Indictment, (T.T. 24), and that Luca, had, during the course of their acquaintanceship, hosted numerous poker parties (T.T. 26-27) and sexually-oriented gatherings which the witness had attended. (T.T. 27-29) During the summer of 1972, West testified, Petitioner had invited him to his apartment, where West met the co-defendant Misco, who was introduced to him as Tommy Mandell. (T.T. 30-32)

Over defense objections, West testified that at this meeting, Luca and Misco told him that they had the opportunity to obtain a truckload of stolen whiskey, but needed money to pay off the driver of the truck, and wanted West to invest in the enterprise. (T.T. 32-34) West procured $1500.00, and turned it over to Luca. (T.T. 35-37)

Approximately ten days later, Petitioner told West that the deal was apparently going through, and that he could get his $1500.00 back, but would have to meet Petitioner at the City Airport Motel in Detroit. (T.T. 37-41)

Pursuant to instructions, West testified, he went to the City Airport Motel on August 9, 1972. (T.T. 42) Misco was there when West arrived, and, shortly after West arrived, Petitioner Luca and a female companion came to the motel, and went with West to a room at the motel, to wait for the persons who were to bring the money. (T.T. 42-44) While waiting, West testified, he, Luca, and Luca's female companion had a drink, and Petitioner produced a bag of marijuana and offered some to the witness. (T.T. 44-46) West testified that he was anxious to be going, as he had an important business meeting to attend, but that Petitioner urged him to wait, and (in the Government's theory, to keep West from leaving) encouraged West to have intercourse with his female companion, a suggestion to which West acceded. (T.T. 46)

Shortly thereafter, the door burst open, and two men with drawn guns came in, announced that they were narcotics officers with a tip that there were narcotics in the room, handcuffed West, Luca, and the woman, searched the room, and found the bag of marijuana that Luca had previously produced. (T.T. 48-51) Although the men were dressed in casual civilian clothes, they produced authentic-looking credentials, apparently from the Wayne County Sheriff's Department (T.T. 252-253), advised the three persons present of their rights, and told the three that they were all under arrest for control of marijuana. (T.T. 48-51)

At this point, Misco entered the room, and, discovering what was in progress, asked the two intruders (one of whom he appeared to know) to step out into the hall. (T.T. 53) Several minutes later, they returned to the room, whereupon, according to West, the following ensued:

Q. Was there a further conversation in the presence of all three?

A. There was a discussion about releasing us.

Q. What was said by whom during that discussion?

A. Well, one of the policemen said, "Gee, I just don't see how we can let them go. What will the other fellows downstairs say, the other police officers. They know we are up here and we have made this arrest. So, it would look bad for us to let you go." At that time, Tommy invited them back out into the hallway.

Q. They said there were other policemen downstairs?

A. Yes.

Q. So then the three went out again into the hallway, is that correct?

A. Yes.

Q. Did they close the door the second time?

A. Yes.

Q. And they left the three of you, the three of you being Lynn, Pete Luca, and yourself, unattended in the room, is that correct?

A. That's correct.

Q. Still handcuffed, is that correct?

A. Yes.

Q. How long were they out in the hallway a second time?

A. Again, a short period of time; a minute or two.

Q. Then what happened?

A. Then all three re-entered. The police came and took our handcuffs off, and said "Don't say anything about this to anybody." Then the policemen left.

(T.T. 54-55)

Immediately after they left, Misco stated: "That little event just cost $5,000.00." (T.T. 56) West testified:

> Q. Now, sir when Tommy made his statement that, as you have testified, 'That little event just cost $5,000.00' — I'm sorry, on August 9, 1972, what did you interpret that to mean, sir?
>
> A. I understood it to mean that Pete and I would be responsible for repaying Tommy $5,000.00.
>
> Q. And what did you understand that claim of Mr. Misco to be based upon, sir?
>
> A. On his statement that the event had cost $5,000.00. I assumed from that that he had either paid or promised to pay the officers $5,000.00.
>
> (T.T. 59)

There followed a series of telephone calls between West, Luca, and Misco, generally having to do with repaying "Tommy" the $5,000.00, or, more particularly, West's half of the $5,000.00. Over the two weeks following the August 9, 1972 incident at the motel, when West was unable to procure the money, Misco, he testified, started to threaten West with both physical harm, and exposure of his sexual activities at the parties which Luca had run; he threatened, according to West, both to put a "deep part" in the witness' head, and to take Luca and his girlfriend, at gun point, to West's house, to force Luca and the woman to tell West's wife "what had transpired in the motel room, and so forth." (T.T. 61-67) Although Luca repeatedly assured West that he was doing all he could to keep Misco "off [West's] back" the threats continued, and, finally, about a month after the incident at the motel, West went to the local police, and told them that threats were being made against them. (T.T. 66-69) The local police turned the matter over to the Federal Bureau of Investigation, who, from that point on, became closely involved with successive events. (T.T. 69)

Apparently, West had become suspicious of Petitioner's real role in the developing situation, and, at the suggestion of Special Agent Thomas Cupples, who was directing the investigation, agreed to record telephone calls between himself and both Luca and West. (T.T. 69-70, 270-271)

The recorded telephone calls were played before the jury, and transcripts of the calls authenticated by the witness, were introduced into evidence by the Government. Essentially, the calls consisted of threats from Misco, and what apparently were anxious efforts by Luca to raise

money (by borrowing from friends, selling his girlfriend's car, and the like) to try to assuage Misco, whom he described as being dangerous and unbalanced, and whom he represented himself to be in fear of, based upon his knowledge of Misco's past record of violence and violent behavior. The calls continued over the next two months. Towards the end of the conversations, West began to express doubts as to whether the "policemen" were in fact policemen, or whether he was being set up in some kind of fraudulent scheme. Luca assured West that they were in fact police officers. (T.T. 211-212). At the suggestion of Agent Cupples, West indicated that he had secured the engagement of a friend of his "Dr. St. John" and that if he and the doctor could meet with the policemen, and convince themselves that they really were policemen, "St. John" would sponsor West in paying off $2,000.00 of the $2500.00 he owed. (Luca, it had been indicated, had already paid his half). (T.T. 208-209) "Dr. St. John", was, of course, to be an FBI agent (T.T. 221-222), but the meeting never transpired, because Misco (who had earlier agreed to produce the officers) now indicated that he would not set up such a meeting. (T.T. 224-225) Instead, Misco told West to forget the whole thing. (T.T. 223)

Two of the counts in the Indictment charged violation of the Travel Act, 18 USC §1952 and conspiracy to violate that statute, based upon the fact that one of the telephone calls (on October 2, 1972) was placed by Peter Luca to Milton West while West was in Windsor, Ontario, Canada. However, inasmuch as it emerged that on the day in question, West had gone to Canada at the insistence of one of the FBI agents, who was working on the case, because "there would be an additional count in the Indictment [if] West were to receive a call across state lines." (T.T. 315) The Court, on the motion of the defense, dismissed those

two counts at the conclusion of the Government's case, finding entrapment "as a matter of law". (T.T. 489-490)

It was the theory of the Government that the entire series of events was an elaborate ruse to obtain money from Milton West; that West had been purposefully detained in the motel room to set him up for the "staged" raid, and that Luca, notwithstanding his protestations of friendship and alliance with West against Misco during the course of the subsequent transactions, was actually working in collusion with Misco, reinforcing Misco's threats by vouching for his violent nature. It was the theory of Petitioner Luca that the raid, so far as he knew, was genuine, and that he was as much a victim of Misco, as was West.

On October 15, 1975 Petitioner was found guilty, by a jury, of the remaining four Counts of the Indictment. On March 4, 1975 Petitioner was sentenced to concurrent terms of ten years imprisonment upon each of the four counts of the Indictment of which he was convicted.

Petitioner filed timely notice of appeal and on October 29, 1975 the Sixth Circuit Court of Appeals via a *per curiam* opinion affirmed Petitioner's conviction; (a copy of the opinion is appended hereto). This is Petitioner's petition for a Writ of Certioriari.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED A FAIR TRIAL BY THE CONDUCT OF THE TRIAL JUDGE IN REJECTING IN THE COURSE OF PETITIONER'S CROSS EXAMINATION, FACTUAL ASSERTIONS WHICH WERE DIRECTLY CONTRARY TO PETITIONER'S THEORY OF THE CASE, IN BELITTLING PETITIONER'S COUNSEL, AND IN GIVING SUA SPONTE A JURY INSTRUCTION WHICH WAS GRATUITOUSLY CRITICAL OF AN ASPECT OF PETITIONER'S THEORY OF DEFENSE.

A factual question of central importance to the case as presented to the jury was whether the two men who had announced the arrest of the occupants of the motel room, on August 9, 1972, were in fact police officers and, more significantly, were in fact actually acting in an official capacity, making a bona fide arrest, or whether, as the Government maintained, were really either not police officers, or not acting as police officers, but, rather were in league with Misco and Luca, in manufacturing a ruse to separate Mr. West from his money.

The point most crucial to the Government's theory was that Luca had been acting in concert with Misco to keep West in the motel room so that the allegedly bogus police officers could make the allegedly bogus arrest and pretend to be paid off by Misco, this was, of course, the premise upon which the alleged extension of credit was made. Luca had, of course, assured West that the policemen were working as a part of an interdepartmental "Metro Squad", in narcotics investigation. (See, *e.g.*, T.T. 200, 211-215) If the jury believed that Luca was lying about the men really being policemen, and the arrest being a genuine one, (matters about which Luca assured West he was positive), it would, of course, strongly suggest that Luca was indeed attempting to carry through a ruse—the inference which was a basis of the Government's prosecution.

The Government suggested strongly that the men who had burst into the motel room, claiming to be police officers, were not in fact police officers, continually referring to them as "alleged" police officers. (See, *e.g.*, T.T. 10, 54, 56) arguing that the evidence strongly suggested that they were "not legitimate policemen" (T.T. 537), and the like, but, perhaps more significantly, the entire thrust of the Government's presentation was that the entire series of happenings had been planned from the beginning, that the Defendants had involved West in the stolen whiskey transaction to make him feel like a partner in crime, and reluctant to go to the police when the "scheme" finally came to fruition (T.T. 536), that West had been lured and detained at the motel room, so that he could be caught in the prearranged phony "raid" (T.T. 537), and, quite clearly, that, even if the men who had announced the arrest of West and the others in the hotel room were, (as strange, the Government suggested, as it might seem), policemen, they were certainly not acting as such and in the scope of their employment on the afternoon of August 9, 1972, and that the "raid" and arrest was merely the predicate for the execution of the alleged conspiracy to get $2500.00 from the witness West.

Petitioner Luca, of course, attempted to show that the officers, and the "raid" appeared to be, and were, in fact, genuine. In light of the fact that Luca had, as noted above, repeatedly assured West in the course of the consentually monitored telephone conversations, that the police officers were "100%", it was crucial to demonstrate to the jury

that Luca was either correct in that belief, or that the assertion was made in good faith, and appeared likely to be true. (Given the information that the jury knew that Luca had.)

It is Petitioner's contention herein that his attempts to put forth this theory were fatally and improperly impeded by the actions of the Trial Judge, and the credibility of his defense as a whole seriously and unjustifiably undercut by the Trial Judge's conduct.

In the course of the Petitioner's cross examination of the FBI case agent Thomas Cupples, Petitioner first attempted to show that in this law enforcement officer's experience, it would not be unexpected to have officers engaged in narcotics investigations present a casual (and sometimes off-beat) appearance, as the testimony showed the two men who announced the arrest of the witness West had. (See T.T. 438-439)

As defense counsel attempted to further develop his inquiry, the following colloquy between Court and counsel ensued:

> Q. (By Mr. Boggs, continuing): Mr. Cupples, did you go to the local police stations and give this information to the Sheriff's office that you had information that a police officer, or a sheriff or deputy was getting a pay off?
>
> The Court: Sheriff's office wouldn't be conducting a raid on a hotel or motel in the City of Detroit.
>
> Mr. Boggs: Yes, they would because—I'll get to that. I'll explain that to you.
>
> The Court: I don't need any explanation, but I didn't know they had that type of jurisdiction.

Mr. Boggs: They do.

The Court: In the City of Detroit?

Mr. Boggs: Yes. Well, I can ask Mr. Cupples.

Q. (By Mr. Boggs, continuing): Narc squads are made up of what police departments, sir?

Mr. Anderson [Government attorney]: Well—

Q. (By Mr. Boggs, continuing): If you know.

Mr. Anderson: I am going to object to this. He said he's an FBI agent.

Mr. Boggs: I am trying to answer the court's question.

The Court: I don't want any answer. Go into the incident of August the 9th and not a general overtone as to whatever narcotics agents in the country, or in the world, or where they are, how he dressed, and everything else. Let's pin it down, for what we have here for consideration, and not rambie all over the acre.

Mr. Boggs: I don't intend to ramble, your Honor, but there has been testimony that a badge was shown for a Deputy Sheriff's Badge. The Court said the Deputy Sheriff does not get involved in that type of work.

The Court: I didn't say that. I said they don't have the jurisdiction in the City of Detroit.

Mr. Boggs: They absolutely do, your Honor.

The Court: Well, okay.

Mr. Boggs: And that's all I'm trying to get out, to find out what the narcotics squads consist of, where do the officers come from. That's all I'm trying to get out to answer your question, your Honor.

The Court: Well, don't answer mine, ask him some questions.

Mr. Boggs: That's what I'm trying to do. Thank you.

Q. (By Mr. Boggs continuing): Did a narcotics squad, also known as a narc, did they consist of more than one police department combined?

Mr. Anderson: Well, your Honor, I'm going to object to this. Not only is it broad, he hasn't indicated—

The Court: I understand the objection.

Mr. Boggs: I have no other questions. Thank you.

(T.T. 442-444)

What the Court did, Petitioner submits, was to interject before the jury its own opinion on a matter of fact which was for the jury's determination, to in effect testify as an unsworn witness, not subject to cross examination, as to a matter which the jury might well have felt was particularly within the Court's cognizance, being after all a matter of fact concerning the enforcement of the criminal law.*

* Although the record before this Court of course does not reflect directly upon the merits of the disputed question of fact, the writer of this Brief can represent, as an officer of this Court, that the Court was more wrong than right, and defense counsel more right than wrong. Indeed, this Court might well be in a position to take judicial notice of the fact that it is common practice in the Detroit area for officers of various police agencies, including the Wayne County Sheriff's Department, to engage in narcotics investigation jointly, often resulting in the making of arrests, searches, "raids" and the like, within the corporate limits of the City of Detroit. While the basic premise of petitioner's argument herein is that the Trial Court acted improperly in, in effect, making itself a witness upon a disputed question of fact, and becoming a proponent of a particular assertion of fact, independent of whether or not the factual matter asserted was correct or in incorrect, petitioner submits that the fact that the Court was indeed incorrect in its assertion somewhat aggravates the error, because the jury was not only influenced, but worse, misled, by the Court.

The Court's comments can only be taken to mean either that the two men could not have really been Wayne County Sheriff's officers, or, that they could not have been acting within the scope of their employment (since they would not have had jurisdiction in the City of Detroit).

While undoubtedly a Federal trial judge is not confined to the role of a mere moderator of the proceedings before him, however, it is equally clearly recognized that:

> "The influence of the Trial Judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference and may prove controlling". This Court has accordingly emphasized the duty of the Trial Judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one sided"; *Quercia v. United States*, 289 US 466, 470, 53 S Ct 698, 699, 77 L Ed 1321 (Hughes, C.J.)

It is particularly important, Petitioner submits, that the Trial Judge not impinge upon a Defendant's "carefully guarded right to, have his guilt or innocence adjudged by the jury." *United States v. Ornstein*, 355 F2d 222 (CA 6, 1966) Thus, in *Ornstein*, the Trial Judge's unequivocal pronouncement before the jury to the effect that the Government "proved" several necessary elements of the crime charged in the indictment denied the Defendant a fair trial: "The Defendant had the right of having the elements of proof of crime determined by the jury upon the evidence introduced." 355 F2d *supra* at 225.

Indeed, Federal Appellate courts have repeatedly held fatally erroneous the conduct of trial judges in effectively removing matters of fact which were properly for the

jury's consideration from the jury, by virtue of expressions of opinion or statements of fact which would inevitably have great weight upon the jury.

Thus, in *Holt v. United States,* 267 F2d 497, (CA 8, 1959), the Court held faintly erroneous the Trial Court's conduct in advising the jury (upon the occasion of an objection by the Prosecution to defense counsel's argument) that a certain witness (whose testimony had been read to the jury) had specifically made a certain statement:

> [T]he Court did not leave to the jury to determine what the fact was with reference to when McFadden appeared upon the scene. The removal by the Court of this fact issue from the consideration of the jury wrongfully invaded the jury's exclusive provence, to determine the facts for itself, and this ruling as to the evidence on this question completely destroyed counsel's argument that the Government witnesses may have mistaken McFadden for the defendant. (Citations omitted) 267 F2d *supra* at 500.

The principle impropriety of the Judge's action, the Court ruled, was in making for the jury "an absolute determination of an important fact." *(ibid)*

This is precisely the impropriety represented by the action of the Court in the case at bar.

In *United States v. Schibbaro,* 361 F2d 365 (CA 3, 1966), identification of the defendant was a hotly contested issue. There had been testimony to the effect that the perpetrator of the crime had borne a facial scar. The question arose as to whether the defendant had ever previously had a scar or indicated he had had a scar. The Third Circuit held erroneous the Trial Judge's interjection into this contested area the observation that "scars

can be mended". (361 F2d *supra* at 369). While the misconduct of the Judge in *Schibbaro* may have resided as well in the possibility that his comments may have conveyed some spirit of partisanship to the jury, it seems clear that the fundamental error was that into a disputed area of fact vouchsafed a proposition of fact, not subject to the oath, and immune from cross-examination. It may or may not be a matter of common knowledge as to whether scars of the sort described in *Schibbaro* can be mended or not; one would think that, at the very least there is a critical inference involved, and, more likely, there is a significant proposition of fact. In any event, it is for the jury to draw the inference, and for the Government to present witnesses to prove the facts, if prove the fact it will. It is certainly not for the Trial Judge to cast himself in the role of a witness, expert in the area of the healing qualities of the skin (as in *Schibbaro)* or in the jurisdictional activities of state law enforcement agencies (as in the case at bar).

It would seem that, as has been suggested above, when the factual question has to do with an area which lay jurors would ordinarily associate with members of the legal profession (and judges as particularly distinguished members of that profession), the great deference which those jurors would ordinarily give to expression from the bench would be even greater. This observation, Petitioner submits, merely underscores the prejudice to Petitioner in the case at bar. The Court's attention in this regard is drawn to *Bursten v. United States,* 395 F2d 976, 986 (CA 5, 1968), in which the Court, (although finding the record replete with the most outrageous misconduct on the part of the Trial Judge) specifically noted as improper the Trial Court's expression of its understanding of what the tax bracket of a corporation might be.

The danger of prejudice in this area is so great that the Courts have ordinarily found Trial Judges' assertions of facts which would not have otherwise been in evidence to be fatally erroneous even when the statements were made inadvertently, and even, indeed, when, as in *Horton v. United States,* 317 F2d 595 (CA DC 1963) the Trial Judge has gone to great lengths to attempt to cure the harm through instructions. In *Horton,* the Trial Judge admonished defense counsel, in response to an objection to a line of cross examination of a defense psychiatric witness to the effect that the Defendant had been found competent to stand trial; narcotics addiction as a mental illness was the defendant's principal defense. See also, *Bowie v. United States,* 345 F2d 605, 609 (CA 9, 1965) (Conviction reversed because Trial Court inadvertently advised jury that Defendant had been under arrest in connection with another case when certain statements were made.)

It should be noted that unlike *Horton,* or any number of the cases cited above, the Trial Judge in the case at bar did not, at any point, instruct the jury to the effect that the comments of the Court should not be taken as evidence, or that the Court had not intended to express an opinion upon the facts of the case, or, that if he did, it should not preempt the jury's own independent consideration.* Thus, the harm in the case at bar went wholly unalleviated.

Petitioner submits that the conduct of the Court in interjecting the remarks referred to next above is sufficient, in and of itself, to mandate the grant of a new trial. However, that impropriety does not stand alone in the course of the trial at bar. Upon at least one occasion, the Trial Judge, interrupted Petitioner counsel, and admonished him in a gratuitously belittling fashion:

* The Court only commented on factual assertions made by counsel.

Q. By Mr. Boggs (Petitioner's counsel): Do you know, sir, that if I took this tape—or do you know if it's possible to take this tape and blot out part of it by making any type of noise? Do you know that, sir?

A. I don't know that.

Q. You don't know it?

The Court: I'll advise the jury now, merely asking the question isn't proof of anything unless it's corroboration from the witness, so just keep that in mind.

Mr. Boggs: Well, that's true, your Honor. And I—

The Court: That's all.

Mr. Boggs: I realize by doing that, I don't intend to be testifying. I'm sorry if that's the impression.

The Court: Well, that's what you are doing.

Mr. Boggs: Well, I'm not trying to do that, sir. I'm just trying to ask a question.

The Court: Well, if you are not trying to do it, apparently, are you telling us you don't have control of what you are saying?

Mr. Boggs: I have control.

The Court: Well, then don't say it.

(T.T. 297)**

Petitioner submits that, in the colloquy, as well as in the closing examination in regards to the conduct of narcotics investigation (See colloquy, *supra),* the Court went beyond the bounds of what was necessary or appropriate to control the reception of evidence in the course of the proofs,

** 118A-119A.

and, more pointedly, in this last excerpt, gratuitously injected a note of ridicule and belittling which seriously and substantially prejudiced the Petitioner's right to a fair trial.

While granting broad deference to the responsibility and discretion of Trial Judges, Federal Appellate courts have been careful to shield Defendants in criminal cases from untoward effects of Trial Courts' expressions of disdain, disapproval and annoyance for defense counsel. As the Second Circuit Court of Appeals wrote in *United States v Ah Kee Eng,* 241 F2d 157, 161 (CA 2, 1957):

> While the Trial Judge should be permitted considerable attitude [sic] in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus, repeated indications of impatience and displeasure of such nature to indicate that the Judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense.

See also *United States v Koenig,* 300 F2d 377 (CA 6, 1962).

As the Court noted in *Jackson v United States,* 329 F2d 893, 894 (CA DC 1964), "In a jury case, a Trial Judge should exercise restraint and caution because of the possible prejudicial consequences of the presider's intervention." This observation, Petitioner submits, is particularly apt in the case at bar.

The "presider's interventions" may also, manifestly, if subtly, impede the Defendant's right to the effective assistance of counsel, insofar as they "tend to unnerve" and throw defense counsel off balance so that he could not devote his best talents to the defense of his client. *United States v Kelly,* 314 F2d 461, 463 (CA 6, 1963). See also *Young v United States,* 346 F2d 793, 795 (CA DC 1965). Even the most casual perusal of the colloquy set forth at pages 442-444 of the Trial Transcript (and set out hereinabove) make it painfully clear how trial counsel for Petitioner "trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial," *United States v Ah Kee Eng,* 241 F2d *supra* at 161, and withdrew from areas of inquiry which were crucial to the Petitioner's defense.

Counsel for the co-defendant Misco presented his case largely upon the theory that no extortionate means had been used—upon the grounds that the witness West had never genuinely been in fear of his life, his reputation or his physical safety, but had taken advantage of the FBI's eagerness in gathering evidence for a prosecution in order to further some private end of his own. (See: *e.g.,* T.T. 560-563.) While the propriety of the agent's conduct was called into question, both by cross examination and argument, no theory or defense of entrapment was advanced. Nevertheless, the Trial Judge, *sua sponte* gave the following instructions to the jury:

> Mr. Dunn [Misco's attorney], during the course of his argument drew the conclusion that maybe the agent, the FBI agent erected this entire thing. Well, the law in that respect is as follows: it is well settled that the fact that Government agents merely furnish opportunities or facilities for committing the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises, though it's customary in the work of FBI agents and all other police agents

to assist others who may be in the process of committing a crime. (T.T. 585.)

The instruction, Petitioner submits, reflected equally adversely upon both defendants. Not only did it harbor the possibility of suggesting to the jury that the Court felt that the defendants had been engaged "in criminal enterprises" but, more significantly, perhaps, it tended to put the implicit stamp of the Court's endorsement upon the conduct of the FBI in the course of the investigation which led to the prosecution in the case at bar. It seems clear that to admonish, through instruction, defense counsel for arguing as to the impropriety of law enforcement action is an improper exercise of a Trial Court's authority. See, *e.g. Gudger v United States,* 314 F2d 268 (CA DC 1963).

It may be that this instructional error would not, in and of itself, mandate reversal. However, against the background of the matters discussed above, Petitioner submits, the giving of the instruction assumes serious proportions, because it continued the implicit demeaning of the theory of the defense, and confirms what Petitioner contends is a pattern of impropriety which effectively deprived him of a fair trial.

Petitioner submits that the case at bar is an appropriate vehicle for this Court to clarify and delineate the rule regarding the limits of permissible conduct by trial courts. The Court should grant certiorari both to rectify the error in the instant case, and also to formulate and lay down authoritative guidelines for the Federal Trial Courts in general.

II.

PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE FACTS ADDUCED AT TRIAL WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, AND WHEN VIEWED AS WHOLLY SUPPORTING THE GOVERMENT'S THEORY OF THE CASE, DO NOT SHOW AN "EXTENSION OF CREDIT" WITHIN THE MEANING OF 18 USC §891 TO HAVE TAKEN PLACE.

The Statute under which Petitioner stands convicted, 18 USC§894, makes it an offense to knowingly participate in any way, or conspire to do so in the use of extortionate means to "collect or atempt to collect any extension of credit." 18 USC §894 (a)(1). Extortionate means are defined as any means involving the use, or the express or implied threat of use of "violence, or other criminal means to cause harm to the person, reputation, or property of any person." 18 USC §891 (7).

"Extension of credit" is defined by 18 USC §891 (1), as follows:

> (1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or expressed, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

Petitioner's position is that, even assuming for the sake of this discussion only the sufficiency of the Government's proofs as to the extortionate nature of the conduct complained of, and the Petitioner's participation therein, that nonetheless, his conviction must be reversed, and he be discharged from custody, upon the basis that, given the Government's theory of the case, and the evidence adduced at

> connection with the utilization of credit and included in this purpose is the desire to protect the consumer from being forced to make credit repayments through extortion.

The significance of the legislative purpose in this regard, Petitioner submits, is that the statute must be read, in light of its legislative history, to apply to improper means or attempts employed to collect debts, which, if not legally enforceable, *in fact exist*. Thus, the report dealing with that portion of the enactment under which Petitioner was charged specifically refers to the collection of "an indebtedness": "§894(a) covers these situations by making it a criminal offense to collect an *indebtedness* by extortionate means, regardless of how the *indebtedness* arose." 1968 US Code Cong & Adm News, p. 2028. (Emphasis added.)

While the provisions of 18 USC §891 (1) defining the term "to extend credit" are broad indeed, that provision must be read with reference to the legislative history and congressional purpose from which the statute sprang. If so read, Petitioner submits, it clearly appears that the broad language of such was constructed to ensure that the statute would be applied against all manner of debts or loans which *in fact exist*.

Of course, if the Government's theory is taken as proven, no debt or loan was ever made or existed.

Petitioner submits that it would stretch the ambit of the statute far beyond its breaking point to hold the statute applicable in a situation in which, if the Government were to prevail completely, it would only succeed in convincing the jury or the fact finder beyond a reasonable doubt that there was no debt or loan *in fact*, and that, therefore, the statute should not be held to be properly enforced.

trial, no "extension of credit" within the meaning of the statute was argued or proven.

The Government's theory of the case was than what was involved in the case at bar was an elaborate scheme or ruse on the part of Petitioner and Tommy Misco directed against the witness Milton West. It will be recalled that basic to the Government's position was that the persons who had identified themselves as police officers at the City Airport Motel on August 9, 1972 either had not in fact been police officers, or, at the very least, were not acting in an enforcement capacity but, rather, were acting in collusion with the defendants to stage a phony "raid".

Implicit in that theory, of course, is that no pay off was made to the "police officers".

If, as seems appropriate, the Government's theory is to be taken as true and proven, Petitioner simply submits that no extension of credit was ever made, and that therefore, no matter how inappropriate or reprehensible the conduct directed against the witness West, it nonetheless does not constitute a violation of the Federal statute here at issue.

The Extortionate Extension of Credit Act, chapter 42 of Title 18, was originally enacted at Title II of the Consumer Credit Protection Act of 1968, 82 Stat 159, PL 90-321. As the title of the enactment of which the act in question is a part indicates, the title of the bill suggests, the focus of the legislation was upon commercial credit transactions. Title II was added to meet experienced difficulties in the prosecution of loan sharking activities, particularly as incidents of organized crime. See Congressional Findings, §202(a), PL 90-321. As the Court noted in *United States v Carvelli*, 340 F Supp 1295, 1305 N25, ED NY 1972:

> The over-riding purpose of the Consumer Credit Protection Act was to safeguard the consumer in

Manifestly, the integrity of the prosecution itself which is here called into question. Yet, equally clearly, it was not the intention of Congress to enact a simple extortion statute, any more than it was to enact Federal usury statute (C. F. 1968, US Code Cong & Adm News, p. 2029). Yet surely, if "schemes" such as the Government posited as the premise of its prosecution herein are within the reach of the statute here at issue, the effect would be to make of the Extortionate Extension of Credit Act nothing more than an extortion statute, plain and simple.

The statute, as written, and even as Petitioner would have it read, represents a significant alteration in the traditional Federal-State balance as regards the regulation of private conduct. Recognizing that a broad extension of the Federal police power was not involved in the enactment, Congress enunciated the findings which led it to take the action that it did (Section 201(a), referred to hereinabove). Those findings, and whatever scraps of legislative history may be found, strongly suggest that the focus of Congressional attention, and the Congressional rationale for the extension of the Federal police power which the statute represents, was a concern for credit—for loans and debts—and underscore that it was not a Federal *extortion* statute which Congress intended to enact but rather a statute dealing with and focusing on abuses in connection with the enforcement of real or actual (however valid or invalid) loans, debts and obligations.

To adopt the construction of the statute which would permit an affirmance of Petitioner's conviction would, as noted above, have the effect of interpreting the statute as nothing more than an extortion statute, identical in its elements and scope to any of the extortion statutes which have been enacted by the fifty states. As this Court

wrote* in *United States* v *Bass*, 404 US 336, 30 L Ed 2d 488, 92 S Ct 515 (1971), "in the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for Federal enforcement and would also involve a substantial extension of Federal police resources."

Absent a clear mandate from Congress, the Court should not interpret the statute to reach the kind of conduct which, in the theory of the Government, was involved in the instant prosecution, for to do so would be to judicially extend the Federal police power in a dramatic and untoward fashion, to an alarming and unjustified degree.

This Court should hold that the Petitioner's conviction was premised upon a theory of the facts which would not bring the conduct alleged within the scope of the statute under which he was convicted. His conviction should therefore be reversed, and he be discharged from custody.

III.

PETITIONER WAS DEPRIVED A FAIR TRIAL BY THE IMPROPER ARGUMENT OF THE GOVERNMENT ATTORNEY.

Petitioner premises error upon a number of clearly improper argumentative excesses and improprieties in the argument of Government counsel to the jury. The improprieties ranged from an expression of personal belief in the guilt of the Defendant to exhortations to civil duty, to appeals to passion and prejudice, to shocking and abusive characterizations of the Defendants and the alleged defense.

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* In regard, of course, to a different statute.

Discussion of these assignments of error might be best begun with the setting out of certain excerpts from the argument of Government counsel to the jury:

> "Ladies and gentlemen, this is an atrocious crime. The facts of this case, the facts to establish guilt beyond a reasonable doubt have, of each count in the indictment, been presented to you. They have been gathered by the Government agent here, been gathered in a good faith attempt to gather the evidence to show you what's happened. The agents have done their job. I have come into the courtroom and tried my best to present the evidence to you and to argue the happenings in this case. Now you have a job. Your job, under the facts and circumstances of this case, are to find these defendants guilty beyond a reasonable doubt. T.T. 548-549).
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> • • •
>
> This is not a case of convicting innocent men, of convicting protesters to certain causes, of convicting people against whom the charges have been drummed up, and that happens. Of course it happens. And it's reprehensible when it happens. This is no such case. You know it. I know it, and the evidence is in those tapes. When these defendants engaged in these acts, when they did anything to further these acts as alleged, they became criminally responsible for those acts. They willingly assumed that responsibility. Some people are drawn into criminal acts by force, by violence, by necessity, by misfortunes of life. Those tapes, those conversations, the uncontroverted testimony of the witnesses

> in this trial show no such motivation, mitigation or underlying circumstances in this case. This was a carefully contrived, conceived and atrocious crime. To fail to recognize that, and to fail to convict these defendants in lieu of these evidences, I submit to you, would be just as atrocious." (T.T. 567)

Petitioner notes with some astonishment (and a certain degree of perverse admiration) that in something like thirty lines of the printed record, Government counsel manages to engage in virtually every form of improper argument and that has been noted and disapproved by the Appellate Courts:

A. Expressing a Personal Opinion in the Guilt of the Accused

> "This is not a case of convicting innocent men, of convicting protesters to certain causes, of convicting people against whom the charges have been drummed up, and that happens . . . this is no such case. You know it. I know it, and the evidence is in those tapes."

Government, counsel assures the jury that these men are not innocent, and that he knows it. He adds, almost as an afterthought, that the evidence shows it too. It requires virtually no citation of authority for the proposition that it is improper for a prosecuting officer to express his personal opinion of the guilt of the accused. As the District of Columbia Circuit wrote in *Harris v United States*, 402 F2d 656, 659 (CA DC 1968):

> "The personal evaluations and opinions of trial counsel are at best boring irrelevancies and a distasteful cliche-type argument. At worst, they may

be a vague form of unsworn and irrelevant testimony."

There is no prosecutorial excess so clearly improper, as for the public prosecutor to throw the weight of his own opinion and, at least impliedly, extra judicial knowledge, into the scales in which an accused's freedom hangs balanced. See, e.g., *United States* v *Wasko* 473 F2d 1282 (CA 7, 1973); *Greenberg v United States,* 280 F2d 472, 474-475 (CA 1, 1960); Canon 15, *Canons of Professional Ethics, American Bar Association.*

B. Inflammatory Characterization of Defendants and the Offense Alleged

"Ladies and Gentlemen, this is an atrocious crime. (T.T. 548)

"This was a carefully contrived, conceived and atrocious crime." (T.T. 567)

Of course, it is manifestly improper for a prosecutor to express his personal opinion regarding the cunning or craftiness of a Defendant. *Steele v United States,* 220 F2d 628, 631 (CA 5, 1955). Just as it is improper to characterize the Defendant as a "hoodlum," *Hall v United States,* 419 F2d 582 (CA 5, 1969), or a "con man", *Getchell v United States,* 282 F2d 681, 690 (CA 5, 1960). The pejorative characterization of the Petitioner in the case at bar as a schemer and a plotter of "a carefully contrived, conceived and atrocious crime," whose allegedly criminal behavior is without justification, excuse or mitigation (see (T.T. 567), was clearly and improperly, an inflammatory, naked appeal to the jury's passions, and not to their rational facilities. The prosecutor's repeated use of the characterization "atrocious," was, to use the words of the *Hall* Court, "especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises—succinct, pithy, colorful and expressed in a sharp break with the decorum which the citizen expects from the representative of his Government." 419 F2d *supra* at 587.

C. Vouching for the Government's Witnesses, and Throwing the Weight of the Government into the Balance of the Jury's Deliberations

"They [the facts of the crime] have been gathered by the Government agent here, been gathered in a good faith attempt to gather the evidence to show you what happened. The agents have done their job." (T.T. 548)

To vouch for the conduct of Government investigators, and their "good faith", as was done by the Government attorney in the case at bar, not only suggests that the jury should be guided by off-record considerations as to the conduct of the investigators, and exhorts the critizen-jurors to support their Government's efforts, but, quite clearly, tends to dilute the protection of the presumption of innocence by the measure of Government credibility which it adds in the case. See, e.g., *Hall v United States,* 419 F2d *supra* at 586; *United States v Cummings,* 468 F2d 274 (CA 9, 1972); CF *Biereck v United States,* 318 US 236, 247-248, 63 S Ct 561, 566-567, 87 L Ed 734, 741 (1943).

D. Instructed the Jury That it was Their Duty to Convict the Defendant

> "Now, you have a job. Your job, under the facts and circumstances of this case, are to find these Defendants guilty beyond a reasonable doubt." (T.T. 549)
>
> "To fail to convict these Defendants in lieu of these evidences, I submit to you, would be just as atrocious."

This is perhaps the most egregious of the Government attorney's excesses. The jury's "job", or "duty" is only "to consider and decide the case on its merits." *Carpintero v United States,* 398 F2d 488 (CA 1, 1968).

Admittedly, no objection was made by trial counsel to any of these remarks. Neither was any curative instruction requested, or given, by the trial Court. Petitioner simply submits that any of this catalog of argumentative excesses could be held to be "plain error," and this Court might well, in considering any single one of the remarks could well conclude that "it did go unadmonished and uncorrected so far out of bounds as to put the District Judge in error in not, of his own motion, admonishing the Government's counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair, and that they should not consider it." *Steele v United States,* 220 F2d *supra* at 631.

> "The United States Atorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all;

> and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Petitioner does not object to the "hard blows" which Government counsel struck in the case at bar; he does, however, take the strongest exception possible to the foul ones. The Court of Appeals in their *per curiam* opinion, utterly failed to give adequate consideration to the outrageous excesses to which the Government counsel indulged in during his closing argument.

This Court should grant certiorari, if for no other reason than to correct the outrageously prejudicial argument of the Government attorney. For this Court to allow this conviction to stand flies in the face of every case limiting the scope of permissible argument. Moreover, the Court has not recently spoken, in the exercise of its supervisory power over the Federal Criminal Justice System, to lay down authoritative guidelines for the guidance of Federal prosecutors and the maintenance of the integrity of the fact finding processes of trial in this regard.

CONCLUSION

Petitioner submits that the opinion rendered by the Court is a complete and total abdication of judicial responsibility in that the Court utterly failed to give any, let alone adequate, consideration to the meritorious issues presented on appeal.

Wherefore, by reason of the foregoing premises, Petitioner prays that this Court issue a Writ of Certiorari to the Unnted States Court of Appeals for the Sixth Circuit and hear this case on the merits.

Respectfully submitted,

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PETITIONER'S APPENDIX

ORDER

No. 75-1565

(U. S. Court of Appeals—Sixth Circuit)

(Filed October 29, 1975)

United States of America,
Plaintiff-Appellee,
v
Peter Luca,
Defendant-Appellant.

Before: Weick, Edwards, Celebrezze, Circuit Judges.

Appellant has appealed his convictions in the Eastern District of Michigan on four counts of a six-count indicament for violations of 18 U.S.C. §§ 894 and 2 (the Extortionate Extension of Credit statute and the general conspiracy statute).

On appeal the Appellant raises three issues: (1) whether the District Court improperly commented concerning some of Appellant's evidence; (2) whether Appellant's actions came within § 894; and (3) whether the government attorney made an argument so unfair as to deprive Appellant of a fair trial.

We have carefully considered the briefs, record and oral arguments and we are of the opinion that Appellant's contentions are without merit and are insufficient to require reversal of the convictions of the Appellant under four counts of the six-count indictment.

It is therefore Ordered and Adjudged that the convictions be and the same are hereby affirmed.

Entered by Order of the Court

/s/ John P. Hehman,
Clerk.